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# Gladys S. Bullough et al v. George Milton Sims et al : Respondent's Reply Brief

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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GLADYS S. BULLOUGH, WINIFRED S.  
McDONALD, GRACE S. MALQUIST,  
IRMA S. HANNIBAL, CLEVELAND K.  
SIMS and LOUIS K. SIMS,

*Plaintiffs-Respondents*

vs.

GEORGE MILTON SIMS, ELMER L.  
SIMS and BEVERLY SIMS CAND-  
LAND,, Executors of the Estate of MIL-  
TON K. SIMS, Deceased; GEORGE A.  
SIMS, G. GRANT SIMS, ELMER L.  
SIMS, SIMS REALTY COMPANY, a  
corporation, EVELYN B. MAZURAN,  
MARJORIE S. SIMS, LILLIAN SIMS  
and ROBERT E. SIMS,

*Defendants-Appellants*

Case No.  
10,039

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GLADYS S. BULLOUGH, WINIFRED S.  
McDONALD, GRACE S. MALQUIST,  
IRMA S. HANNIBAL, CLEVELAND K.  
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## RESPONDENT'S REPLY BRIEF

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Come now the Appellants and make the following  
Reply to the Respondents' and Cross Appellants' Brief.

## STATEMENT OF FACTS

The statement of facts set forth in the two briefs now on file, Appellants' and Respondents' are adopted generally except as to the following corrections of asserted "additional facts" set forth by Respondents.

Respondents quote (p 6-7) parts of the testimony of George A. Sims to show that all of their lives the Plaintiffs have "looked up to" him. This we proudly concede as he has done nothing to change their continued love and respect for him. However, the record should also show that at the time of trial, George A. Sims was over 80 years of age and his memory of past events was no longer sharp.

The quoted language of George A. Sims (p 17) refers to (R 185) which was from an earlier deposition of Mr. Sims. The preceding pages (R 311) contained of series of "can't remember," "don't remember" which showed that age had robbed Mr. Sims of many of his past recollections. The quotation given by Respondents (p 17) from his deposition must be placed in context which referred to 1932 (R. 316).

"Mr. Berol: Q. In 1932 when your father died, . . ."

## ARGUMENT

## POINT I.

RESPONDENT'S CROSS-APPEAL IS TO RESCIND CONTRACT BUT THEY HAVE FAILED TO RESCIND AND RESTORE STATUS QUO.

The Respondents have cross-appealed upon the premise that now their 1932 contract was void or unenforceable upon the grounds of fraud, mistake or undue influence. In other words, now they would rescind their 1932 Agreement.

When may the right of rescission be exercised? "A right to rescind, abrogate or cancel a contract must be exercised promptly on discovery of the facts from which it arises; it may be waived by continuing to treat the contract as a subsisting obligation." 12 Am Jur 1092. "One who claims a right of rescission must act with reasonable promptness . . . ." *Farrington v. Granite State Fire Ins. Company*, 120 Utah 109, 232 P.(2d) 754, 758.

What is this fraud, etc. of which the Respondents complain? Apparently it is that on April 6, 1932 their dearly beloved older brother presented an Agreement to them to be signed after their father's funeral. Surely these adult Respondents had recovered from their grief

by 1933, 1934, 1935 or at least 1936 to read their Agreement and rescind then. Yet they have waited 28 years before uttering any sound of complaint. For 28 years they have all received and retained the benefits of their Agreement.

By what means is this rescission asserted? Not by any election, notice, complaint, or formal pleading, but by their counsel's Statement of Contentions. This is a bold assertion of fraud but no offer to return the benefits of their Agreement or restore the status quo. This is an essential part of rescission of a contract. 12 Am Jur 1032.

These Respondents would like to have this Court by some magic revoke and cancel their Agreement of 1932, yet permit them to retain all of the benefits of their interpretation of the said contract. Why is this so important to the Respondents? Why are they desperately endeavoring in 1964 to avoid their 1932 Agreement?

They know that their Agreement was a sale then and there of their interests to the new Salt Lake Transfer Company. They know that they were not and are not partners. Unless their belated effort to rescind is accepted by this Court, then they must be bound by that Agreement which has in its terms the two things which they fear:

(a) clear and unambiguous terms of a present sale and present purchase in 1932; and

(b) the method for setting the value of their interests so sold to the new Salt Lake Transfer Company.

We've discussed (a) at some length in our initial brief. The second item (b) has only been touched upon in passing. By their April 6, 1932 Agreement, the Respondents in paragraph 3 agreed that after 6 months demand the present Salt Lake Transfer Company shall "pay for each one-ninth so purchased, one-ninth of the sum found as the value of the George H. Sims interest as per the Bill of Sale above mentioned." This was their father's April 2, 1932 Bill of Sale which said that "the value of the same shall be appraised by *Gladys S. Bullough* and *George A. Sims* and the figure set by these two shall be binding upon the withdrawing Grantee."

Respondents are bound by that. Either the Court must permit them to rescind at this late date or hold them to their Agreement. They cannot rescind as they have not restored the status quo or offered to do so, nor have they proven any basis for the purported rescission.

Let us consider what a chaotic problem would be on the hands of the Court and before the Respondents if their Agreement was determined to be void and the proposed recission was allowed. Each of these six Respon-

dents would be required to disgorge their benefits from their Agreement. A review of the exhibits will show that each has received some \$48,300.00 from the new Salt Lake Transfer Company, a total of nearly \$300,000.00 which would needs be accounted for and returned with interest.

## POINT II

COURT MAY NOT REWRITE OR MAKE NEW CONTRACT FOR RESPONDENTS BUT MUST GIVE REASONABLE INTERPRETATION TO EXISTING AGREEMENT.

No power is vested in the District Court to rewrite the Agreement and Bill of Sale to please Respondents. That Court has found that there was no fraud and that finding is amply supported by competent evidence. We have discussed this in our earlier brief.

That the Court will give a *reasonable* construction to the language of the parties, is so elementary as to require no citation. The Respondents would invoke a strained and fanciful meaning to the parties' intention as shown by the language of these two 1932 documents. Wishful interpretations are not the guide post for this Court.

As this Court said in *Hardringe Company v. Eimco Company* 266 P (2d) 494 1 Ut. (2d) 320 a reasonable reconcilliation of the parts of a contract will control in

interpreting the intention of the parties. Ordinary, plain meanings of words will apply, *Bryant v. Deseret News* 233 P (2d) 355, 120 Utah 241.

### POINT III

#### AGREEMENT NOT AMBIGUOUS AND VALUATION PROCEDURES SET IN 1932 MUST BE FOLLOWED.

By Respondents' POINT IV many vague, hypothetical questions are suggested. Fanciful problems not germane to the issue may be imagined in any contractual relationship. Speculative theses are not to guide the Court in the direct and understandable interpretation of the parties' Agreement. Though most matters have been previously covered by our prior brief, let us comment on a few items suggested by the Respondents.

The method of valuation is clearly stated — one seller and one buyer shall appraise. This is not ambiguous — the two appraisers are identified by name and both are parties to this proceeding and both made the appraisal in 1947.

It becomes critical now for us to consider the status of the valuation which was made by the two individuals designated in the Bill of Sale by Respondents' father on April 2nd, 1932 and ratified and adopted by the Respondents by their Agreement of April 6, 1932. These documents designated Gladys S. Bullough, one of the Respondents and George A. Sims, one of the Appellants, to value



the interests that were sold under the Agreement in 1932. That such a valuation was made in 1947 (Exhibits D-H and D-I) is not disputed. Mrs. Bullough concedes that she signed the documents and that they bear the signature, also of her brother, George A. Sims. On page 45 of Respondents' Brief, they contend that she did not participate in deriving the figures in the accounting and did not actually make an evaluation or check on the fair value of real estate or franchise. "To hold that all six of the plaintiffs were bound by such a travesty of a valuation would be a gross injustice."

What they omit to say is that her husband, who actually prepared the books and records in 1932 and was familiar with them until his military service in 1940 did spend much time in 1947 in reviewing the books and records and determining the values and that she relied upon him for her guidance in executing the two valuation exhibits. It is not necessary for one to personally inspect ledger or examine each truck or evaluate each item of property in order to participate in a determination of the matters contemplated by their father's Bill of Sale, if someone else is engaged by her to do those things for her. She knew of her husband's experience in the company operations before his military service. He came out of the service a Major and was in an independent business wholly apart from Salt Lake Transfer Company in 1947 and, hence, was under absolutely under no compulsion or direction from the Salt Lake Transfer Company when he participated in the 1947 audits and evalu-

action. His wife relied upon his experience, knowledge and judgment in 1947 and there seems to be no reason why she should be permitted to reject such in 1960.

The language of Respondents' Brief on page 45 infers that though it may be just to bind Mrs. Bullough by her 1947 evaluation, yet they consider a "travesty of a valuation" as to all six of the Plaintiffs, even though she is one of the six. This presents a queer morality as these six Plaintiffs-Respondents seem to feel that their written Agreements have no sanctity and no binding effect and can be destroyed by their own say so, 20 or 30 years later. They are the ones who contracted to accept and be bound by a valuation made by Gladys S. Bullough and George A. Sims. The phrase "gross injustice" used by them is more appropriate to justify their own belated attempt to escape the clear and unambiguous terms of their Agreement.

This April 6, 1932 Agreement referred to their father's Bill of Sale dated April 2nd, and said "the undersigned approve of such Bill of Sale and of the method therein set forth for valuing the share owned by George H. Sims at the time of execution of such Bill of Sale." There is nothing difficult to understand in that language. Two paragraphs prior thereto the Bill of Sale was identified so that no misapprehension could be asserted as to which Bill of Sale was in question. The method set forth for valuing the shares is spelled out in the Bill of Sale and has been referred to above and the time is spelled out as the time of the execution of such Bill of Sale.

## CONCLUSION

WHEREFORE Appellants respectfully submit that the Court should reverse the District Court's determination that the valuation of the assets sold in 1932 should be predicated upon the 1960 status of Salt Lake Transfer Company. We submit that a clear, reasonable and consistent interpretation of the two documents, bind all of the parties to a valuation as of 1932 and that such valuation has been made by the representatives of the sellers and the buyers as prescribed by their father. To hold otherwise would require the court to re-cast the language of the Bill of Sale and the Agreement into a mould now proposed by these Plaintiffs and negative the clear intent of their father and of themselves as executed in 1932. To sustain the District Court's Judgment, a premium would be placed on the duplicity of these Plaintiffs, who, taking advantage of the advanced age and failing memory of their elder brother and forgetting their 28 years of acquiescence in the terms and conditions of their Agreement have now, with impunity reneged on their Agreement. They seek to rescind their contract without offering to restore the status quo and intemperately attributed fraud to the brother, whom they profess to so dearly love.

Respectfully submitted

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